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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 549

WEST PUBLISHING COMPANY, A CORPORATION,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

JOHN W. PRESTON,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, West Publishing Company, also petitioner in the court below (R. 1-11), respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case (R. 249) on the 19th day of August, 1942. A rehearing was denied by said court (R. 249-250) on the 14th day of September, 1942, and the judgment of said court is final. The Supreme Court of California is the highest court of law or equity in said state.

Opinions Below.

The Supreme Court of California rendered one opinion in the case (R. 236), which is reported in Advance California Reports (August 25, 1942), pp. 755-769, 128 Pac. (2d) 777-784.

Jurisdiction.

The judgment of the Supreme Court of California was entered on the 19th day of August, 1942. The jurisdiction of this Court is invoked under section 237 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. sec. 344(b)).

Statutes Involved.

The statute involved is:

The Use Tax Act of 1935 of California (Statutes of 1935, p. 1297), the pertinent provisions of which are set forth in the Appendix, p. 21.

Summary Statement.

This is an original proceeding in the Supreme Court of California, brought by petitioner against the Superior Court of the State of California, in and for the City and County of San Francisco, for a writ of prohibition to restrain the respondent Superior Court from taking further action in a certain cause pending therein, being No. 298088, wherein The People of the State of California is plaintiff, and the petitioner is defendant (R. 67-78). The Supreme Court of California discharged the alternative writ of prohibition previously isssued and denied the peremptory writ of prohibition (R. 249).

Statement of Cause No. 298088 in Respondent Court.

Said Cause No. 298088 in the respondent court was filed on the 15th day of October, 1940, by The People of the State

of California, as plaintiff, against petitioner, as defendant, to recover the total sum of $36,922.50, of which $27,000.00 was alleged to be due as use taxes from petitioner, and the remainder thereof as penalties and interest for the taxable period commencing July 1, 1935, and ending December 31, 1939 (R. 67-78).

Petitioner, the defendant in said Cause No. 298088, specially appeared therein on November 29, 1940, and filed a motion to quash the service of summons therein upon the following grounds:

(a) That it is a foreign corporation and at the time of the attempted service was not present, domiciled or doing business in California.

(b) That no person in California is authorized to represent it, and that no person authorized to represent it was served with process; that the attempted service was upon salesmen whose sole duty and power was to solicit orders for petitioner's merchandise, and that such services were incidental to the interstate and foreign business conducted by petitioner from its home office in St. Paul, Minnesota.

(c) That petitioner maintains no place of business in the State of California.

(d) That petitioner is not now and has never at any time been a retailer with a place of business in California.

(e) That petitioner engages exclusively in business of an interstate character and is not amenable to the process of respondent court under the Use Tax Act, or under the general law of California relating to foreign corporations, and that to make it amenable to such process would unduly burden interstate commerce, in violation of Article I, section 8, clause 3, of the Constitution of the United States of America.

(f) That to declare the attempted service of summons herein binding would, in effect, be to take petitioner's property without due process of law, contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States (R. 80, 81, 82, 83).

The evidence introduced in Cause No. 298088, upon the hearing of petitioner's motion to quash service of summons, established the following facts:

Petitioner was incorporated in the year 1882 under the laws of Minnesota, and its incorporation was renewed in the year 1912. The Articles of Incorporation fixed its main office and principal place of business at St. Paul, Minnesota, and there it has engaged in the business of printing, publishing and selling law books and other publications incidental thereto; its only plant is located in St. Paul, Minnesota, and all of its corporate records and books of account are kept exclusively at its home office in that city; all meetings of stockholders and directors are held at its home office, and all of its officers and directors reside in St. Paul, Minnesota (R. 85, 86). Petitioner has not had any office or other place where its business has been conducted except at St. Paul, Minnesota, except only it has solicited the sale of its books and publications by traveling salesmen throughout the United States and certain foreign countries (R. 85, 86, 87). It employs four traveling salesmen in California who interview prospective customers for petitioner's books and publications, and solicit orders therefor, and all orders obtained by such salesmen must be sent to the home office in St. Paul for approval or rejection by petitioner (R. 86, 87). If an order is accepted the books are delivered in St. Paul, Minnesota, to a common carrier, freight charges prepaid, for shipment to the purchaser in California (R. 87, 88). Neither petitioner nor any of its salesmen makes

or has made deliveries of its books in California (R. 88, 89, 102, 103). Petitioner's salesmen have no authority to make any contract on its behalf or to make or conclude any sale of books or subscription contract, or to negotiate any purchase on its behalf, or otherwise to act as its agents in any capacity (R. 89). Petitioner has not leased or occupied any real estate or other premises in California, nor has it owned, leased, stored, used or kept any personal property in that state for many years past except only that each of its salesmen has a supply of sample books which are not kept or offered for sale or sold in said state (R. 86). Petitioner's salesmen make no collections of delinquent or other accounts except occasionally, when specially directed by the home office, nor can they adjust complaints or claims, or take notes, or repossess or resell any books, or make any allowance, or extend any credit, except when specially instructed by the St. Paul office, or as covered by the terms of a written order subject to approval of petitioner at its home office in St. Paul (R. 101).

The judgment of the respondent court was that petitioner's motion to quash service of summons be denied (R. 205).

Thereupon, petitioner filed this original proceeding in the Supreme Court of California to restrain the respondent from taking any further action in said Cause No. 298088 pending therein (R. 67-78).

Holding of Supreme Court of California.

The Supreme Court of California, in substance, held that petitioner is a retailer maintaining a place of business in California, within the meaning of the Use Tax Act of 1935, and that it is present within and subject to the process of the respondent court. The grounds for the holding of the Supreme Court of California are summarized as follows:

(a) that petitioner engaged in the practice of shipping books into the state without previous orders, and thereafter made sales of the books so shipped, through its salesmen in that state; (b) that its salesmen have authority and may exercise independent discretion or judgment in the collection of delinquent accounts of customers in California; (c) that its salesmen are "trouble shooters" in adjusting customers' complaints; (d) that petitioner has obtained a large volume of business in California over a period of years because of the orders obtained by its salesmen; and (e) that petitioner enjoys advantages of "a fixed local habitation" because of the office space obtained and used personally by its salesmen.

The foregoing holdings of the Supreme Court of California are not sustained by the record. Inasmuch as petitioner has challenged the jurisdiction of the respondent court throughout these proceedings, this court will determine for itself, from the record, whether there was lack of jurisdiction over petitioner (*Consolidated Textile Corp.* v. *Gregory,* 289 U. S. 85, 77 L. Ed. 1047; *Philadelphia & R. R. Co.* v. *McKibbin,* 243 U. S. 264, 61 L. Ed. 710).

The decision of the Supreme Court of California, in effect, holds that the mere solicitation of orders by the traveling salesmen of a foreign corporation amounts to such doing of business therein as to make the corporation subject to the process of the courts of that state.

Petitioner respectfully urges that the decision of the Supreme Court of California is contrary to the decisions of this Court and that the enforcement thereof would unduly burden the interstate commerce in which petitioner is engaged, contrary to the provisions of Article I, section 8, clause 3, of the Constitution of the United States, and would deprive it of its property without due process of law, contrary to the provisions of the Fourteenth Amendment of said Constitution.

The Questions Involved.

The principal questions here involved are:

1. Petitioner is a Minnesota corporation, with its home office and manufacturing plant at St. Paul in that state. It is not domiciled or licensed to do business in California, but its salesmen solicit orders for the sale of its merchandise to persons residing in that state. These orders are not binding until they are sent to and are accepted by the corporation at its home office in St. Paul. If and when accepted, the goods thus ordered are delivered to a common carrier in St. Paul for shipment to the purchaser in California, freight charges prepaid. Does this constitute doing business in such manner and extent as to subject the foreign corporation to the process of the courts of the State of California?

2. Compelling the petitioner to submit to the process of the courts of the State of California on the theory that it is maintaining a retail place of business therein is, under the facts here shown, casting an undue burden upon interstate commerce in violation of Article I, section 8, clause 3, of the Constitution of the United States.

Reasons Relied On for the Allowance of the Writ.

I.

The Supreme Court of California has decided Federal questions in a way not in accord with the applicable Decisions of this Court.

The court below has in substance decided that the mere solicitation of orders for the sale of merchandise by the salesmen of a foreign corporation which is not otherwise present, domiciled or doing business in the state, constitutes such doing of business therein as to make such corporation subject to the process of the courts of that state.

This decision is not in accord with the decisions of this Court. (*Green* v. *Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916; *Philadelphia & R. R. Co.* v. *McKibbin*, 243 U. S. 264, 61 L. Ed. 710; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587; *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325, 69 L. Ed. 982.)

A.

(Errors below as to factual basis for holding that Petitioner was present and doing business in California in such manner as to make it subject to the process of the courts of that State.)

The several grounds stated in the opinion of the court below for holding that petitioner was present and doing business in California have been summarized, ante. These grounds are not supported by the facts shown in the Record. They are stated as follows:

(*a*) *That petitioner engaged in the practice of shipping books to customers without prior order, and that its salesmen completed sales by calling upon and inducing customers to retain the books* (R. 179).

The record discloses only one instance of such shipment without prior order (R. 195-197, 201) that tends in the least to support such holding. Upon examination, the record shows clearly that the salesman in that one instance did not make or complete the sale, but even if he had completed the sale it is an isolated transaction and did not subject petitioner to the process of respondent court. (*Hunter* v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 573, 54 L. Ed. 1155.)

(*b*) *That petitioner's salesmen have authority to make collections on delinquent accounts in the exercise of a limited discretion* (R. 179).

Petitioner's instructions to its salesmen (R. 101, 115, 116, 140) and the evidence of the salesmen (R. 140) show that salesmen collect delinquent accounts occasionally, *but only upon specific instructions from the home office at St. Paul.* The salesmen have no discretion whatever in making a collection, but must follow routine instructions given them by the home office. Such occasional collections of delinquent accounts by the salesmen did not subject petitioner to the process of the respondent court. (*Hilton* v. *Northwestern Expanded Metal Co.*, 16 F. (2d) 821; *Mas* v. *Owens-Illinois Glass Co.*, 34 F. Supp. 415; *Davega, Inc.* v. *Lincoln Furniture Mfg. Co.*, 29 F. (2d) 164.)

(*c*) *That petitioner's salesmen had authority to adjust complaints* (R. 238).

This holding is contrary to the evidence (R. 89, 101, 203) which shows that salesmen, in making adjustments of complaints, can act only after and upon specific instructions given them from the St. Paul office. The salesmen cannot exercise any discretion whatever, but must follow a routine procedure prescribed by the home office.

(*d*) *That petitioner has obtained a large volume of business in California through solicitation of orders for goods by its traveling salesmen.*

Factually, this is true. But mere volume of interstate business is not sufficient to subject a foreign corporation, not licensed, domiciled or carrying on intrastate business within the state, to the process of the courts of that state. (*Real Silk Hosiery Mills* v. *City of Portland*, 268 U. S. 325, 69 L. Ed. 982.)

(*e*) *That petitioner enjoys the advantages of a place of business in California by reason of the office space ar-*

ranged for and used by its salesmen for their personal convenience (R. 245-246.)

The implication in this holding is that petitioner maintained a place of business in California. This is not correct. But even if petitioner had rented and paid for office space for the convenience of local solicitors, that would not make it subject to the process of the court of the state. (*Green* v. *Chicago, B. & Q. R. Co., supra; People's Tobacco Co.* v. *American Tobacco Co., supra; Minnesota Commercial men's Association of Benn,* 261 U. S. 140, 67 L. Ed. 573; *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147, 62 L. Ed. 632.)

It is clear that the court below misconceived and misconstrued the facts in evidence as establishing a factual basis for holding that petitioner was present and doing business in California in such sense as to make it subject to the process of the courts of that state. The record is challenged for support of the holdings of the court below. Instead, the record shows plainly that petitioner's salesmen were not vested with and could not and did not exercise any of petitioner's corporate powers within the State of California. The record further shows that the activities of petitioner's salesmen within said state were incidental to and in furtherance of interstate commerce only.

B.

(Errors below in holding that a combination of activities, no one of which was sufficient, constitutes doing business to such extent as to make petitioner subject to the process of respondent court.)

The lower court made the following statement in its opinion concerning the activities of a foreign corporation in a state other than that of its domicile:

"While it is clear from these general observations that the application of a practical test is necessary to determine the validity of the service of jurisdictional process upon a foreign corporation, certain fundamentals have been settled establishing that neither isolated business transactions (Hunter v. Mutual Reserve Life Ins. Co., 218 U. S. 573, 31 S. Ct. 127, 54 L. Ed. 1155, 30 L. R. A., N. S., 686) nor the mere solicitation of business (Green v. Chicago, Burlington & Quincy Ry., 205 U. S. 530, 27 S. Ct. 595, 51 L. Ed. 916), nor holding stock in subsidiary corporations (Peterson v. Chicago, Rock Island & Pac. Ry., 205 U. S. 364, 27 S. Ct. 513, 51 L. Ed. 841; People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 S. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537), even to the point of complete control (Cannon Manufacturing Co. v. Cudahy Packing Co., 267 U. S. 333, 45 S. Ct. 250, 69 L. Ed. 634), nor advertising or demonstrating products (Harrell v. Peters Cartridge Co., 36 Okl. 684, 129 P. 872, 44 L. R. A., N. S., 1094), nor its listing in the telephone directory or having its name on the door of an office (Philadelphia & Reading R. Co. v. McKibbin, 243 U. S. 264, 37 S. Ct. 280, 61 L. Ed. 710), nor the presence of a corporation official on personal business (Riverside & Dan River Cotton Mills v. Menefee, 237 U. S. 189, 35 S. Ct. 579, 59 L. Ed. 910) will amount to the presence of the corporation. It is thus apparent that it is not *any* activity of a corporation in a state other than that of its residence which will justify the conclusion that it is 'doing business' there, so as to make it amenable to process there, *but it is the combination of local activities conducted by such foreign corporation—their manner, extent and character—which becomes determinative of the jurisdictional question.*" (Italics ours.)

The lower court thus holds that it is the combination of local activities conducted by a foreign corporation which determines the question of whether such corporation has

become subject to the jurisdiction of the courts of another state. We insist that it is not the number of activities engaged in by a foreign corporation, whether one or many, that is controlling, but, rather, it is the "nature and character" of such activities that will determine the presence of the foreign corporation in another state. By way of illustration, if all of the activities of such a corporation are incidental to and in furtherance of interstate commerce, and no intrastate business is involved in such activities, as here, then, whether few or many, such activities would not subject the corporation to the process of the local courts.

This Court has held in numerous cases that continued solicitation of orders by the salesmen of a foreign corporation, coupled with the collection of money by them, is not doing business. This Court has also held that the continued solicitation of orders and the advertising of its business by the foreign corporation is insufficient to constitute doing business in such sense as to make the corporation subject to the process of the local courts. (*Green* v. *Chicago, B. & Q. R. Co.*, supra; *Philadelphia & Reading R. Co.* v. *McKibbin*, supra; *Real Silk Hosiery Mills* v. *City of Portland*, supra.) See, also, *Cannon* v. *Time, Inc.*, 115 F. (2d) 423, 425.

Other examples of combinations of activities of a foreign corporation held insufficient to subject it to the process of local courts could be multiplied, but the foregoing shows that the court below was in error in holding that a mere combination of activities was alone sufficient to make the foreign corporation subject to such process.

Petitioner asserts that any and all activities engaged in by it and its salesmen in the State of California were incidental to and in furtherance of its business in interstate commerce, and that no one or all of such activities was sufficient to confer jurisdiction upon the local courts.

C.

(The opinion of the Supreme Court of California rests upon decisions of the State and Federal Courts that have been modified or overruled and which are not applicable to this case.)

On the question of what constitutes doing business, the opinion of the Supreme Court of California cites *International Harvester Co.* v. *Kentucky,* 234 U. S. 579, 58 L. Ed. 1479; *Tauza* v. *Susquehanna Coal Co.,* 220 N. Y. 259, 115 N. E. 915; and *American Asphalt Roof Corporation* v. *Shankland,* 205 Ia. 862, 219 N. W. 28, and relies almost entirely upon those cases for the conclusion reached that petitioner was doing business in California.

The *Harvester Company* case, supra, was decided by this Court in 1914. It seemed to modify or change the rule previously announced by this Court in 1907, in *Green* v. *Chicago, B. & Q. R. Co.,* 205 U. S. 530, 51 L. Ed. 916. Following the decision of this Court in the *Harvester Company* case some confusion as to its meaning arose among the bench and bar. This confusion appeared to be due in large measure, if not entirely, to the following language of the opinion, p. 585 (1482):

> "Here was a continuous course of business in the solicitation of orders which were sent to another state, state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction."

The language of this court just quoted, supra, is given especial emphasis in the opinion of the Supreme Court of California, appearing in Italics and obviously, as appears from a full reading of that court's opinion, was relied upon in reaching the conclusions stated therein.

Without attempting to state the facts of the *Harvester Company* case, it is here sufficient to say that it has not been closely followed by this Court and other federal courts. In fact, this Court, in 1918, in *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 62 L. Ed. 587, explained and modified its holding in the *Harvester Company* case. In the *Tobacco Company* case this Court said, p. 87 (590):

> "As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that state, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it. Green *v.* Chicago, B. & Q. R. Co., 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; Philadelphia & R. R. Co. *v.* McKibbin, *supra.*
>
> "The plaintiff in error relies upon International Harvester Co. *v.* Kentucky, 234 U. S. 579, 58 L. ed. 1479, 34 Sup. Ct. Rep. 944, but in that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the state, but there was also authority upon the part of such agents to receive payment in money, checks, and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; * * *"

The doctrine announced by this Court in *Green* v. *Chicago, B. & Q. R. Co.,* supra, which seemed to have been modified by this Court's holding in the *Harvester Company* case, was apparently reaffirmed in *Philadelphia & R. R. Co.* v. *McKibbin,* 243 U. S. 264, 61 L. Ed. 710, and particularly in *People's Tobacco Co.* v. *American Tobacco Co.,* supra.

While it is true that only this Court can interpret its decisions with finality, it seems apparent that the exercise of some corporate authority and power by the agents of the foreign corporation in its behalf was the controlling factor in the *Harvester Company* case. Certainly it is logical to assert that a foreign corporation is not present and doing business in another state where neither it nor any of its agents exercises any part of its corporate authority and power therein.

The holding in the *Tobacco Company* case indicates that before a foreign corporation can be held to be doing business in a state where it is not licensed or qualified, it must be present through its officers or agents who have authority and discretion to exercise some of the powers of such corporation. In the absence of such authority and the exercise thereof, the Court has held in numerous cases that sending soliciting agents into another state and advertising its wares therein did not amount to such doing of business in that state as would subject the corporation to the service of local process. See cases cited, supra.

The Supreme Court of California quotes extensively from the opinions in the *Tauza* case and *Shankland* case, supra, which petitioner respectfully insists are not applicable to the case at bar, the holdings of which, in fact, run counter to the opinions of this Court. The *Tauza* case was decided in 1917, and, of course, the doctrine therein announced is modified, if not completely nullified, by the decision of this Court in the *Tobacco Company* case. Furthermore, the facts in the *Tauza* case easily distinguish it from the case at bar. There the foreign corporation not only maintained local offices for its sales agent, but authorized him to employ other salesmen who were subject to his orders, and those salesmen reported to and received instructions from him daily. This amounted to a delegation of corporate

authority and power to the sales agent, who exercised the same within his own discretion.

In the *Shankland* case, supra, the Iowa Supreme Court apparently misconstrued the holding of this Court in the *Harvester Company* case when it said, p. 870, that "the continuous course of business referred to was the solicitation of orders," disregarding as of any consequence the fact that the agents of the *Harvester Company* were authorized to receive payment in money, checks and drafts on behalf of the company and to take notes payable and collectible at banks in Kentucky. In other words, the Iowa Supreme Court held, substantially, in that case that the continuous solicitation of orders amounted to doing business in that state, without more. This holding of the Iowa court completely disregarded numerous holdings of this Court. Therefore, the *Shankland* case is not authority in the case at bar.

The Supreme Court of California also relied upon *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U. S. 62, 83 L. Ed. 488, as authority for holding that petitioner was doing business in California in such wise as to make it amenable to the process of the courts of that state. The *Felt & Tarrant* case does not relate to or discuss the question of service of process. In that case the foreign corporation submitted to the jurisdiction of the court by instituting the suit. The opinion in the *Felt & Tarrant* case assumes that the foreign corporation was a retailer, maintaining a place of business in the State of California. It was further assumed, without any discussion, that its method of doing business constituted maintaining a place of business in California. This Court held that the commerce clause was not violated if the corporation, in these circumstances, was required to collect the use tax involved. The question of due process of law and the question of doing business sufficient to warrant the service of process on the foreign cor-

poration's local agent were not discussed in the opinion of this Court in that case.

The foreign corporation, in the *Felt & Tarrant* case, shipped goods to its agents in California in bulk, and delivery thereof by them was made to purchasers within the state. This fact of itself distinguishes the *Felt & Tarrant* case from the case at bar, for here petitioner did not receive any goods nor did it deliver any goods to persons within the State of California.

II.

Compelling the petitioner to submit to the process of the Courts of the State of California on the theory that it is maintaining a retail place of business therein is, under the facts here shown, casting an undue burden upon interstate commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

The record shows that petitioner transacts only interstate business in the State of California. There it does nothing more than solicit orders for its books and other publications from residents of that state. These orders, when obtained by its salesmen, must be and are sent to its home office in St. Paul, Minnesota, for acceptance or rejection, and are not binding upon it until accepted. When an order is accepted, the goods ordered are delivered to a common carrier in St. Paul, carrier's charges prepaid, for shipment to the purchaser in California. This amounts to a transaction in interstate commerce. Such a business may not be taxed by the state, since a tax thereon would constitute a burden upon interstate commerce, and therefore would be repugnant to the commerce clause of the Constitution.

Cheney Bros. Co. v. *Massachusetts,* 246 U. S. 147, 154, 62 L. Ed. 632;

Heyman v. *Hays,* 236 U. S. 178, 59 L. Ed. 527;

Ozark Pipe Line Corp. v. *Monier,* 266 U. S. 555, 69 L. Ed. 439;

Alpha Portland Cement Co. v. *Massachusetts,* 268 U. S. 203, 69 L. Ed. 916;

Bingaman v. *Golden Eagle Western Lines, Inc.,* 297 U. S. 626, 80 L. Ed. 928;

Best & Co., Inc. v. *Maxwell,* 311 U. S. 454, 85 L. Ed. 275.

The general purpose of the commerce clause, Article I, section 8, giving Congress power "to regulate commerce with foreign nations, and among the several States," was to protect such commerce from discrimination or regulation by the states or from action which would impose a direct and immediate burden upon such commerce, whether such action was in the form of a tax or otherwise.

N. J. Bell Telephone Co. v. *State Board,* 280 U. S. 338, 74 L. Ed. 463;

Minnesota v. *Blasius,* 290 U. S. 1, 78 L. Ed. 131;

Cooney v. *Mountain States Tel. & T. Co.,* 294 U. S. 384, 79 L. Ed. 934.

The state may not impose a tax upon interstate commerce as such because the exercise of such power would lead to discrimination against such commerce, and would result in the erection of barriers against it and thereby accomplish the very object that was intended to be prevented by the commerce clause of the Constitution.

Baldwin v. *G. A. F. Seeling, Inc.,* 294 U. S. 511, 79 L. Ed. 1032, 101 A. L. R. 55;

South Carolina State Highway Dept. v. *Barnwell Bros., Inc.,* 303 U. S. 177, 82 L. Ed. 734;

Gwin, White & Prince, Inc. v. *Henneford,* 305 U. S. 434, 83 L. Ed. 272.

In this connection, the record discloses that petitioner is not domiciled or licensed to transact an intrastate business

in California. It has not sought nor has it received from that state any benefit or privilege for which the state could seek payment in the form of a tax. It has not there carried on an intrastate business as distinguished from an interstate business. It has not received any benefits from the state government from which the state could derive the necessary right and power to tax it under the authorities.

A State cannot tax a foreign corporation for the privilege of engaging in interstate commerce within the borders of such state. Such a corporation derives its right to carry on an interstate business from the Federal Constitution; it needs no permit therefor from the state and cannot be taxed therefor by the state. *Cheney Bros.* v. *Massachusetts,* supra; *Heyman* v. *Hays,* supra; *Ozark Pipe Line Corp.* v. *Monier,* supra; *Alpha Portland Cement Co.* v. *Massachusetts,* supra; *Bingaman* v. *Golden Eagle Western Lines, Inc.,* supra; *Best & Co., Inc.* v. *Maxwell,* supra.

Petitioner has no local store or place of business in California, nor does it have a stock of merchandise there from which sales and deliveries could be made. It maintains no facilities as a retailer or wholesaler within the state. It receives no goods within the state. It makes all sales and deliveries of goods sold to California customers in St. Paul, Minnesota. It is well settled that delivery to a common carrier, freight charges prepaid, is delivery to the consignee. This principle is fully established in *United States* v. *R. P. Andrews & Co.,* 207 U. S. 229, 240, 52 L. Ed. 185, 190, where it was said:

> "That, as a general rule, the delivery of goods by consignor to a common carrier, for account of a consignee, has effect as delivery to such consignee, is elementary."

Inasmuch as petitioner has no established place of business in California from which it could or does carry on any intrastate business, or any part of its interstate business,

it does not come within the rule announced by this Court in *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888, and *Nelson* v. *Montgomery Ward & Co., Inc.*, 312 U. S. 373, 85 L. Ed. 897.

It is clear, from the foregoing, that California could not lawfully tax petitioner's interstate business, since no factual or legal basis for such tax exists. But, that is exactly what is attempted in the action filed in respondent court against petitioner.

Inasmuch as the tax would be a direct burden upon interstate commerce under the authorities cited, the action filed against petitioner in the respondent court to collect such tax is likewise a burden upon the interstate business in which petitioner is engaged in California. And, because the action is such a burden upon interstate commerce, the motion to quash service of summons should have been granted by the respondent court. For equally cogent reasons the Supreme Court of California should have granted the writ of prohibition to restrain respondent court from taking any further steps in said action.

Your petitioner presents to this Court, and files herewith a duly certified transcript of the entire record of the case, as the same appears in the Supreme Court of the State of California.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court to the Supreme Court of the State of California, to the end that the judgment of the Supreme Court of the State of California may be reviewed by this Honorable Court.

West Publishing Company,
Petitioner,

By John W. Preston,
Charles N. Orr,
Counsel for Petitioner.

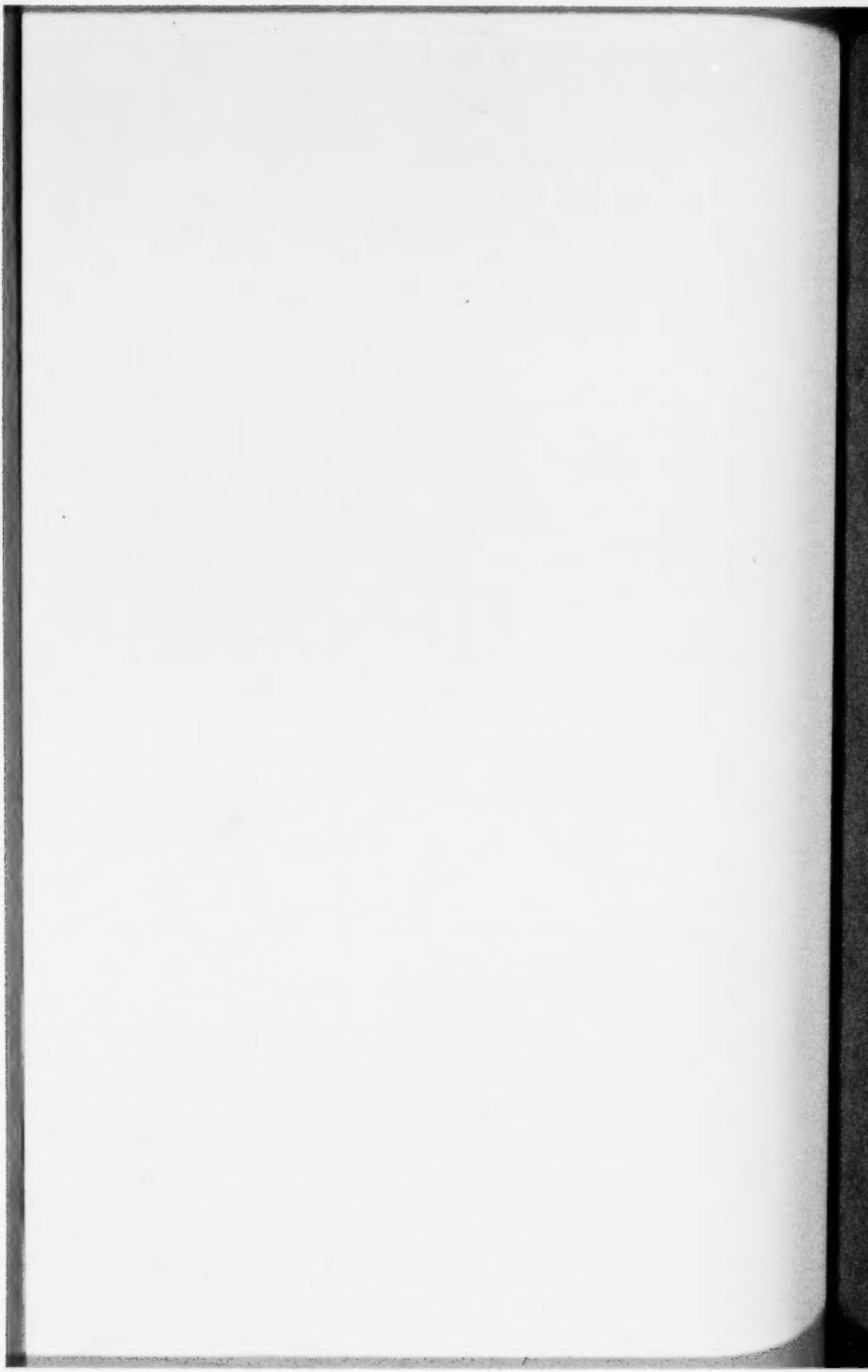
APPENDIX.

The statute involved is the Use Tax Act of 1935 (Statutes 1935, page 1297), as amended, particularly Section 24 thereof which reads as follows:

"Sec. 24. At any time within three years after any amount herein required to be collected has become due and payable and any time within three years after the delinquency of any tax, the board may bring an action in the courts of this State, any other State or in any court of the United States in the name of the people of the State of California to collect the amount delinquent, together with penalties and interest. The Attorney General must prosecute such action. In such action a writ of attachment may issue, and no bond or affidavit previous to the issuing of said attachment is required. In such action a certificate by the board showing the delinquency shall be prima facie evidence of the determination of the amount due hereunder, of the delinquency of the amounts set forth therein and of the compliance by the board with all the provisions of this act in relation to the computation and determination of such amount.

"In any action brought under the provisions of this act process may be served according to the provisions of the Code of Civil Procedure and the Civil Code of this State or may be served upon any agent or clerk in this State employed by any retailer in a place of business maintained by such retailer in this State, in which case a copy of the process shall forthwith be sent by registered mail to the retailer at his principal or home office. (*Statutes 1939 p. 2167; operative* July 1, 1939.)

Revenue Laws of California (1941), pp. 669, 670.



In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 549

WEST PUBLISHING COMPANY
(a corporation),
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI

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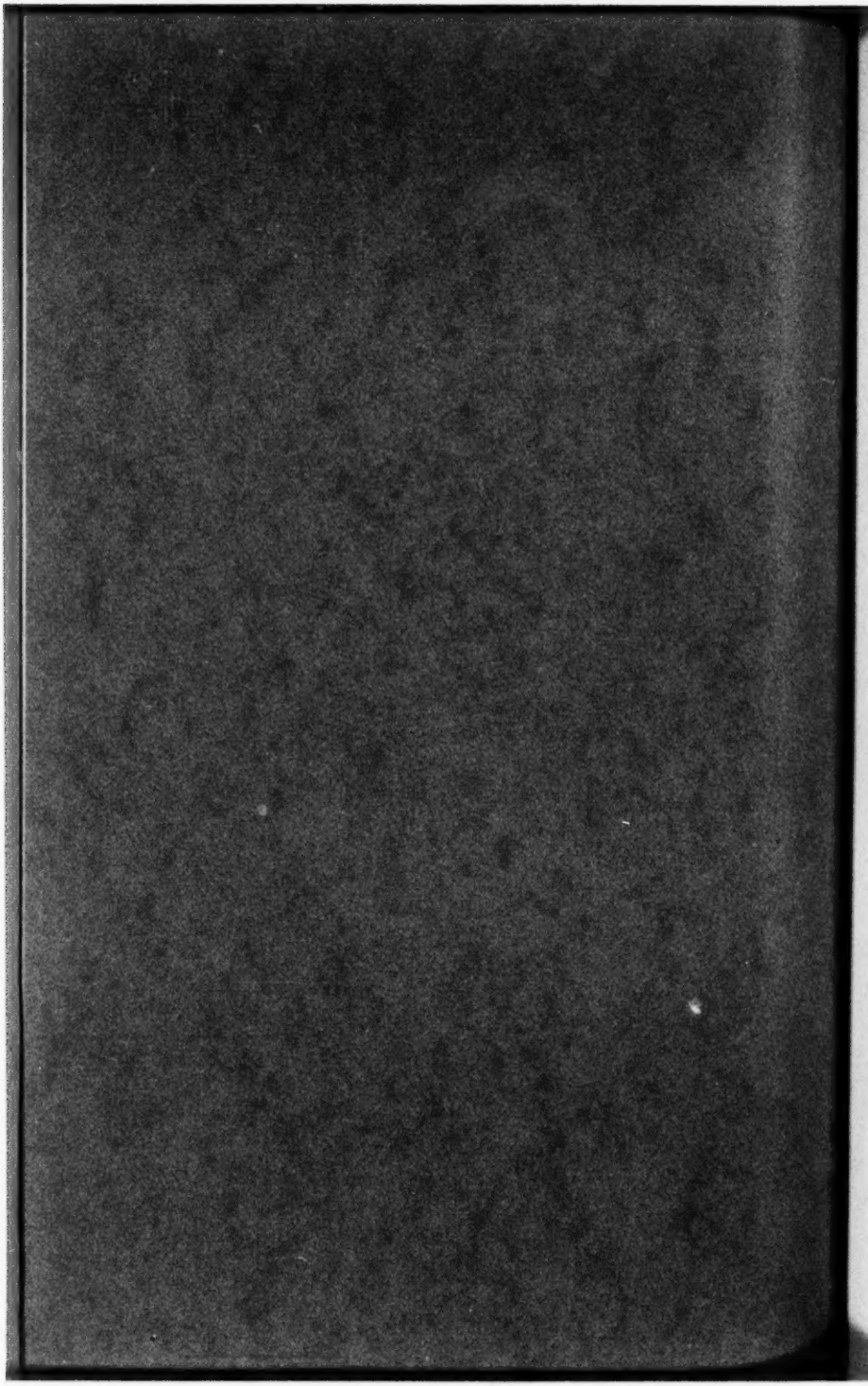

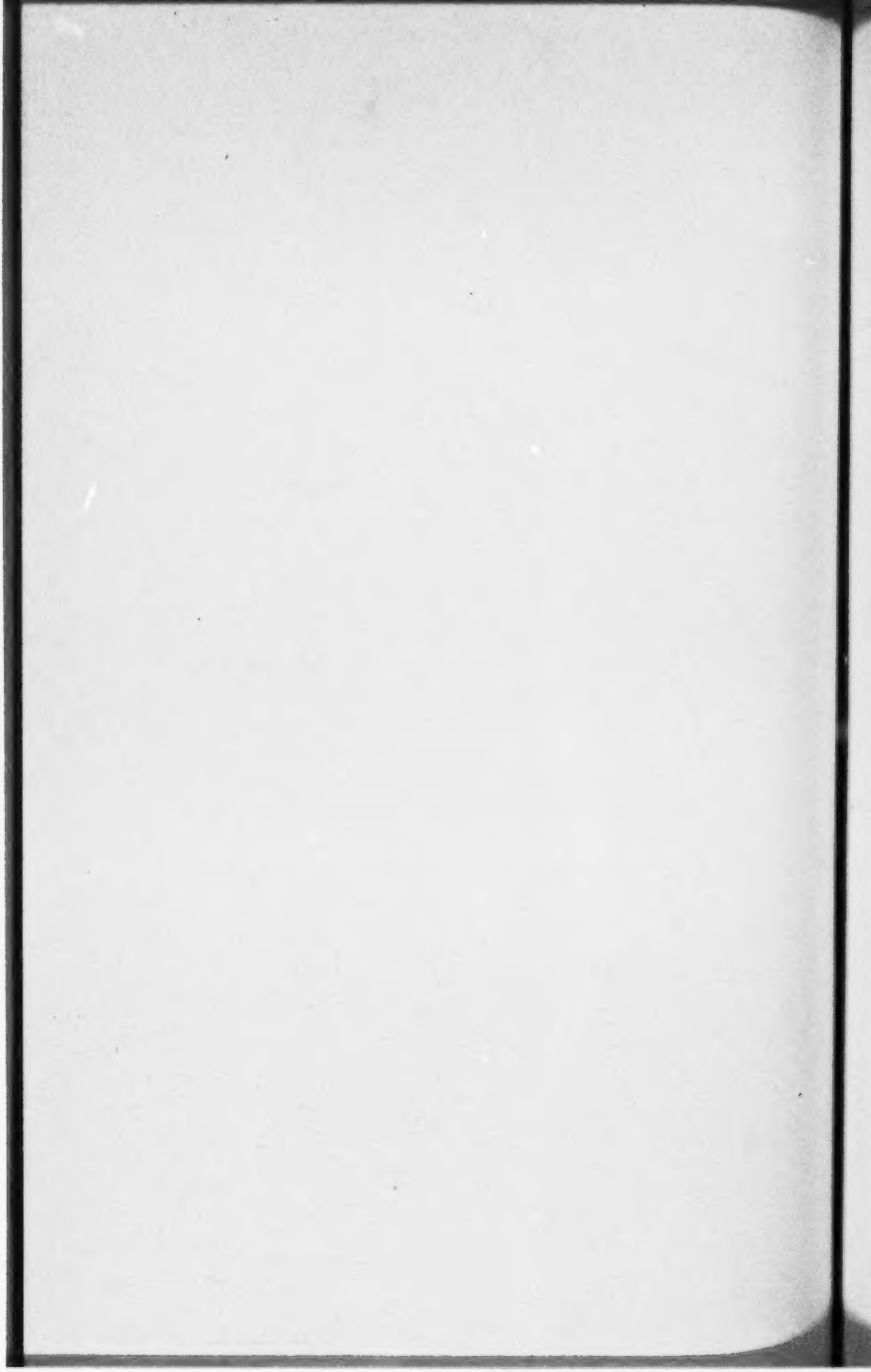

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OPINION BELOW.

The official report of the opinion of the Supreme Court of California rendered in this case may be found in 20 Cal. 2d 720.

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this court under section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. sec. 344(b)).

STATEMENT OF THE CASE.

The People of the State of California brought an action against the petitioner in the Superior Court of the State of California, in and for the City and County of San Francisco, to enforce liability against petitioner as a collector of use tax for the State of California (R. 67). Cf. *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U.S. 62, upholding the power of California to impose such liability.

Section 24 of the California Use Tax Act (Stats. 1937, p. 1944) provides that "* * * in any action brought under the provisions of this act process may be served according to the provisions of the Code of Civil Procedure and the Civil Code of this State or may be served upon any agent or clerk in this State employed by any retailer in a place of business maintained by such retailer in this State, in which case a copy of the process shall forthwith be sent by registered mail to the retailer at his principal or home office."

Service of process was made upon petitioner by delivering copies of the process personally to three of petitioner's agents in the State of California and by sending copies of the process by registered mail

to petitioner at its home office in St. Paul, Minnesota (R. 74-80, 84, 195).

Petitioner filed a motion to quash the service of summons (R. 80). At the hearing of the motion the superior court received a large amount of evidence, both oral and documentary (R. 67-205). Thereafter the court determined that it had jurisdiction over petitioner and denied the motion to quash (R. 205).

Petitioner next sought a writ of prohibition from the Supreme Court of California (R. 1-12). An alternative writ was granted (R. 209) but later was discharged and a peremptory writ was denied (R. 249). A petition for a rehearing also was denied (R. 249-250).

Various inaccuracies and omissions in petitioner's statement of the evidence concerning its business activities will be pointed out in the subdivision of this brief which immediately follows.

ARGUMENT.

I. THE DECISION BELOW IS CONSISTENT WITH AND SUPPORTED BY THE APPLICABLE DECISIONS OF THIS COURT.

A. The record clearly supports the decision.

The substantial nature of petitioner's California business is reflected by its concession that the annual sales in California for the last several years have averaged about $160,000 per year (R. 203).

The record shows that the agents of petitioner upon whom service of process was made in California have

been employed by petitioner for many years, Case for 25 years (R. 198), Carroll for fourteen years (R. 147) and Wilson for ten years (R. 142). Each has been given a separate district in the State of California (R. 97-98). Each has permanent headquarters in the State of California where he spends at least a part of nearly every day (R. 198, 200, 146, 149) and where he receives mail (including purchase orders) and telephone messages (R. 200, 201) relating to the petitioner's business, and where people come to discuss matters affecting business (R. 202). Their contracts of employment with petitioner require them to devote their entire time to petitioner's business (R. 95, 99, 106).

The record shows that the authority of these representatives goes considerably beyond the mere solicitation of orders and refutes petitioner's contention to the contrary.

Petitioner's agents are authorized and expected to obtain the full purchase price or down payment with each order taken. This may be in cash. They are instructed always to obtain the first payment with an order, if possible (R. 95, 118).

They receive not only the down payments which accompany the orders but also from time to time are required to make collections on delinquent accounts (R. 115). In this latter connection, they are expressly authorized, if unable to obtain immediate payment, to "endeavor to line up the account with advance checks dated at thirty day intervals * * *". (R. 115-116). It seems to follow from this that they can fix the amount

and date of the checks, thereby in effect extending the time for payment of the delinquent accounts.

Petitioner's agents are informed of the "best terms" the company is willing to extend and are told: "* * * We wish you to get more cash and give shorter time as a rule. Always try, in the first instance, for better terms than here indicated, and only get down to this basis as a last resort" (R. 121).

The agents' duties include the obtaining of credit information and sending it to the home office (R. 116).

The agents are expressly authorized to assist lawyers in disposing of second-hand sets of books by putting such lawyers in touch with prospective purchasers, when such lawyers are willing to purchase West Publishing Co. books if they can dispose of their second-hand sets (R. 122).

The agents are required to send to the home office a daily report of activities (R. 113) as well as collection reports (R. 115) so that they constantly are in communication with the home office and there is every reason to expect they would do precisely what page 199 of the record shows Mr. Case did do, namely, notify the home office of the process served on them in California.

Petitioner characterized the agents upon whom service was made as its "Local Representatives" in its advertising in California publications (e. g., R. 182, 186).

The record shows that these agents arranged with certain law firms in Los Angeles and San Francisco for office space in exchange for the use of several thousand volumes of law books owned by petitioner, which have been kept up to date by petitioner, and that in exchange for the use of petitioner's books the law firms have accorded petitioner's agents the use of office space and furnished them telephone and other services (R. 161-172). The record shows that petitioner not only acquiesced in these arrangements (R. 204) but actively advertised these locations in California publications as petitioner's "San Francisco Office" and "Los Angeles Office" (e. g., R. 179) and in its advertising suggested that "full details" could be obtained at these addresses (e. g., R. 178, 179). In addition to advertising the addresses of these locations, petitioner also advertised the telephone numbers (e. g., R. 186). The stipulation of the parties with respect to petitioner's advertising is set forth in the record at pages 173 to 194. This stipulation, including the exhibits incorporated therein by reference, was introduced in evidence at R. 173. As shown by the above mentioned advertising, petitioner obtained the advantage of fixed points of contact with the public in California. Certainly the Supreme Court of California was correct in stating that petitioner enjoys the advantages attendant upon the establishment of a fixed and local habitation for the conduct of its business.

It appears from the petitioner's description of its method of doing business that its sales, at least in

part, are made under title-retaining contracts, the petitioner retaining title to the books until payment has been made in full (R. 124). Thus petitioner ships books into the State, retaining a security interest in them which receives the protection of this State.

Nor has petitioner been content to ship books into California only in response to prior orders. The record shows, for example, that petitioner has shipped books into California without prior order, which have thereafter been disposed of in this State. In the letter set forth at page 197 of the record the Attorney General of California protested to West Publishing Co. against its shipping books without order. The reply of the West Publishing Co. is set forth at pages 195 and 196 of the record and the testimony of William M. Case, agent of the West Publishing Co., at page 201 of the record, completes the picture. Petitioner attempts to pass this off as an isolated transaction. But it appears from the correspondence that it is not alone the Attorney General to whom petitioner has shipped books without prior order. Petitioner's letter (R. 196) says: "* * * we determined to send the new series to *all* owners of the Fourth Series * * *." (Emphasis added.) It further appears that this practice has not been confined to the Fifth Series of Words and Phrases, for the Attorney General protested (R. 197) that "*as we have previously advised you,* we do not want books sent to this office except upon order." (Emphasis added.)

It further appears that if the person to whom the books were shipped registered an objection with peti-

tioner to this method of doing business, it sent one of its local representatives around to endeavor to persuade the recipient of the books to retain them. Mr. Case testified that he made such a call at the Attorney General's office and that the books were retained by the Attorney General (R. 201).

Here is a course of conduct which, we submit, is intrastate in character. The books were shipped into the state without prior order. Any sale of them obviously would have to occur after they were in the state. Apparently petitioner satisfied itself as to the credit rating of the persons to whom it shipped the books and nothing remained to consummate the sales but for such persons to indicate their assent to accept the books so shipped to them.

B. Petitioner misconstrues the comment of the court below concerning a combination of activities.

Petitioner construes the opinion of the Supreme Court of California as holding that a combination of activities, no one of which was sufficient, constitutes doing business to such extent as to make petitioner subject to the process of respondent court. It may well be that a cumulation of activities, no one of which alone would be sufficient, would constitute doing business. For example, one or a few isolated business transactions might not constitute doing business whereas frequent repetition of such transactions might call for a different result. However, the opinion below did not rest on that basis. In the portion of its opinion quoted at page 11 of the petition herein, the Supreme Court of California was merely summariz-

ing some of the previous decisions of this court. Many of the activities here present were not referred to in that summary; for example, such previously described activities as the collection of down payments and delinquent accounts by petitioner's agents in the State of California, the use of petitioner's books to obtain office space and petitioner's shipment of books into California without prior order, to mention only a few of such activities. The court below correctly stated the law when it said that "it is the combination of local activities conducted by such foreign corporation —their manner, extent and character—which becomes determinative of the jurisdictional question".

C. The decision below rests upon decisions of this Court which are applicable and controlling.

The decision of this court in the case of *International Harvester Co. v. Kentucky,* 234 U.S. 579, as stated by the court below, is a leading and oft-cited authority on the subject of service of process upon a foreign corporation. The Supreme Court of California made a thorough analysis of that case and the cases which have followed it. The court was careful to point out that some of the subsequent decisions have regarded the authority of the agents to receive payments in Kentucky as the significant factor in the *International Harvester Co.* case whereas others have regarded the quantity and continuity of the solicitation of business in Kentucky as the controlling feature. But, as the court below stated, whichever view is taken as to the controlling factor in the *International Harvester Co.* case, the facts here firmly sup-

port a holding that petitioner was subject to the service of process. We already have pointed out that not only were petitioner's agents authorized and instructed to receive payments in California in connection with all orders taken by them and to collect delinquent accounts from time to time, and not only was there a continuous course of business in the solicitation of orders in response to which large quantities of books were shipped into California, but also there were many other factors not present in the *International Harvester Co.* case. For example, in that case the company's agents were expressly forbidden to have any headquarters in Kentucky, whereas here petitioner's agents enjoy the use of permanent headquarters in California which petitioner has advertised as places for the public to contact in California concerning petitioner's publications. There is no indication in the *International Harvester Co.* opinion that the company shipped any goods into Kentucky without prior order whereas we have shown that the record in this case discloses such activity on the part of petitioner. These are but illustrative of a number of local activities present here but absent from the *International Harvester Co.* case.

Another decision of this court which supports the decision of the Supreme Court of California herein is that rendered in *Felt & Tarrant Manufacturing Co. v. Gallagher,* 306 U.S. 62. It was there held that the State of California could require a foreign corporation to collect and remit the California use tax, even though it had not qualified to do intrastate business

and, we submit, its business activities in California were considerably less than those of petitioner which we have previously pointed out. For example, in the *Felt & Tarrant Co.* case, the company's agents were expressly forbidden to accept payments and it does not appear that the public had any contact with the offices occupied by the Felt & Tarrant Company's agents or that the company engaged in any advertising (cf. *Nelson v. Montgomery Ward & Co., Inc.*, 312 U.S. 373, at 376 on the effect of advertising). Nor does it appear that the Felt & Tarrant Co. shipped merchandise into California without prior order. If California has the power to require such a corporation to act as collection agent, it certainly seems to follow that such a corporation would be subject to process in California in an action relating to its duty as such collection agent. See *Traynor,* "State Taxation and the Commerce Clause in the Supreme Court, 1938 Term", 28 Calif. L. R. 168, 185-186.

Petitioner asserts that the question of due process of law was not discussed in the opinion of this court in the *Felt & Tarrant Manufacturing Co.* case. The best answer to this is the opinion itself for it states, at page 66, that one of the contentions raised and decided adversely to the appellant is that enforcement of the statute would deprive it of its property without due process of law.

An interesting analysis of the problem of service of process upon a foreign corporation is contained in the opinion written by the late Mr. Justice Cardozo in *Tauza v. Susquehanna Coal Co.*, 115 N.E. (N.Y.) 915.

The case of *People's Tobacco Co. v. American Tobacco Co.,* 246 U.S. 79, cited by petitioner, is readily distinguishable, for in that case the solicitors did not have authority to accept payments but were merely authorized to solicit orders. Moreover, doubt has been cast on the *People's Tobacco Co.* case by the decision of this court in *Felt & Tarrant Manufacturing Co. v. Gallagher,* 306 U.S. 62. See *Traynor,* supra, 28 Calif. L. R. 168, 185-186. In the *Felt & Tarrant Manufacturing Co.* case, the agents were expressly denied authority to collect payments. Yet this court held that the State of California could require the corporation to collect and remit the California use tax.

The case of *Philadelphia R. R. Co. v. McKibbin,* 243 U.S. 264, cited by petitioner, is not comparable to the situation here involved. In that case, no agent of the corporation engaged in any business activity on behalf of the corporation in the state where service of process was attempted.

II. THE DECISION OF THE SUPREME COURT OF CALIFORNIA CASTS NO UNDUE BURDEN UPON INTERSTATE COMMERCE.

In view of the decisions of this Court, petitioner's contention that to subject it to the process of the courts of California would violate Article I, Section 8, Clause 3, of the Constitution of the United States, fails to present a substantial federal question.

The record does not bear out petitioner's assertion at page 17 of its petition that it transacts only inter-

state business in the State of California and there does nothing more than solicit orders for its books. We have referred to portions of the record which show that petitioner's activities have gone considerably beyond the mere solicitation of orders and have even to some extent been intrastate in character.

However, even if petitioner's activities were solely interstate in character, the commerce clause presents no objection to the validity of the service of process here involved. The complete answer to petitioner's contention is found in *International Harvester Co. v. Kentucky,* 234 U.S. 579, 587-589, wherein it is held that a corporation engaged exclusively in interstate commerce may be subjected to state process.

The *International Harvester Co.* case is cited in *Natural Gas Pipeline Co. v. Slattery,* 302 U.S. 300, 306-307, as holding that "* * * a foreign corporation engaged exclusively in interstate commerce within the state is amenable to process there as are citizens and corporations engaged in local business. * * *"

The *Natural Gas Pipeline Co.* case upheld the imposition under state law of a requirement that a foreign corporation engaged exclusively in interstate commerce furnish certain information to a state commerce commission.

In *Felt & Tarrant Manufacturing Co. v. Gallagher,* 306 U.S. 62, this court held that a corporation, regarded as engaged exclusively in interstate commerce, was required to collect use tax for the State of California.

Petitioner attempts to support its contention by citing cases for the proposition that a state may not

impose a tax upon interstate commerce. These cases are inapposite in the first place because they are concerned with problems of taxation rather than of service of process. But even if the merits of petitioner's liability to the State of California were here involved, the cases cited by petitioner would not be controlling since no tax upon the operations of interstate commerce is involved.

Cf. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582;

Felt & Tarrant Manufacturing Co. v. Gallagher, 306 U.S. 62;

McGoldrick v. Berwind White Co., 309 U.S. 33, 55-57;

McGoldrick v. Felt & Tarrant Manufacturing Co., 309 U.S. 70;

California v. Thompson, 313 U.S. 109, 112.

CONCLUSION.

We respectfully submit that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
December 30, 1942.

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